Supreme Court, U.S.
FILED

04 307 JUN 23 2004

NO. _____

UNITED STATES SUPREME COURT

October Term, 2003

IN RE: LISA VELA WATSON,
Debtor.

RUDY WAUQUIN VELA, RICHARD W. VELA, JALINDA JOYCE BISSETT, REBECCA LEE VELA, AND LISA DEANNA VELA WATSON,

Petitioners

V.

JESUS M. CASTELLANO AND CASA DE NYLON, A TEXAS PARTNERSHIP, CONSISTING OF ABRAHAM GALONSKY AND ISRAEL LIAZKA,

Respondents

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

A bankruptcy case is dismissed on April 24, 1997, thereby terminating the automatic stay imposed by 11 U.S.C. Section 362. More than four years later, for the first time a request is made to retroactively annul the automatic stay that had been imposed by the dismissed bankruptcy case. The bankruptcy court enters an order retroactively annulling the automatic stay on January 18, 2002. The question presented is whether the Court of Appeals erred in affirming the judgment of the district court which affirmed the judgment of the bankruptcy court retroactively annulling the automatic stay on January 18, 2002 because the request to annul the stay was not timely.

PARTIES TO THE PROCEEDING

The following is a listing of all parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Rudy Wauquin Vela, Plaintiff in the bankruptcy court, Appellant in the district court and Court of Appeals, and Petitioner herein.

2. Richard W. Vela, Plaintiff in the bankruptcy court, Appellant in the district court and Court of Appeals, and Petitioner herein.

3. Jalinda Joyce Bissett, Plaintiff in the bankruptcy court, Appellant in the district court and Court of Appeals, and Petitioner herein.

4. Rebecca Lee Vela, Plaintiff in the bankruptcy court, Appellant in the district court and Court of Appeals, and Petitioner herein.

5. Lisa Deanna Vela Watson, Plaintiff in the bankruptcy court, Appellant in the district court and Court of Appeals, and Petitioner herein.

6. Jesus M. Castellano, Defendant in the bankruptcy court, Appellee in the district court and Court of Appeals, and Respondent herein.

7. La Casa De Nylon, A Texas Partnership, Consisting of Abraham Galonsky And Israel Liazka, Defendant in the bankruptcy court, Appellee in the district court and Court of Appeals, and Respondent herein.

8. Ramon Walter Vela, Plaintiff in the bankruptcy court, and one-time Appellant in the district court (not a party to this application).

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OPINIONS BELOW

This case originated from an adversary proceeding filed in the United States Bankruptcy Court For The Southern District of Texas, McAllen Division, in the case styled Ramon Walter Vela, Rudy Wauquin Vela,Richard W. Vela, Jalinda Joyce Bissett, Rebecca Lee Vela and Lisa Deanna Vela Watson v. Jesus M. Castellano and La Casa De Nylon, A Texas Partnership, Consisting of Abraham Galonsky and Israel Liazka, adversary number 96-2053-M. The adversary proceeding was connected to one of the Petitioner's chapter 13 bankruptcy case styled In re Lisa Deanna Vela Watson, Bankruptcy Case No. 95-24277-M-13 in the United States Bankruptcy Court For The Southern District of Texas, McAllen Division. The district court, Honorable Ricardo H. Hinojosa, J., affirmed in part and reversed in part, holding

that there was an automatic stay imposed by 11 U.S.C. Section 362 but remanding the case back to the bankruptcy court to ascertain if the bankruptcy court intended to retroactively annul the stay. The bankruptcy court entered an order retroactively annulling the automatic stay, and the Petitioners again appealed to the district court. The district court, Honorable Randy Crane, affirmed. Petitioners thereafter appealed to the United States Court of Appeals For The Fifth Circuit. The Court of Appeals affirmed, and thereafter denied the Petitioners' Motion For Rehearing.

JURISDICTION

Petitioners seek review of a judgment entered by the United States Court of Appeals For The Fifth Circuit. The date of entry of the judgment was February 23, 2004. Petitioners as Appellants in the Court of Appeals filed a Motion For Rehearing, which was denied by order entered March 25, 2004.

Section 1254(1) of Title 28, United States Code, confers to the United States Supreme Court the jurisdiction to review the judgment by writ of certiorari.

PERTINENT CONSTITUTIONAL, STATUTORY, AND COURT RULE PROVISIONS

Title 11, United States Code, Section 362, provides in pertinent part:

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim

against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the

commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

.

.

.

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by- terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this

subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section -

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

STATEMENT OF THE CASE

This case originated as part of the chapter 13 bankruptcy of Appellant Lisa Deanna Vela Watson, bearing bankruptcy case number 95-24277-M-13, filed on June 5, 1995. Petitioners in an adversary proceeding sought damages for violation of the automatic stay imposed by 11 U.S.C. § 362.

Petitioners filed an adversary proceeding styled Ramon Walter Vela, Rudy Wauquin Vela,Richard W. Vela, Jalinda Joyce Bissett, Rebecca Lee Vela and Lisa Deanna Vela Watson v. Jesus M. Castellano and La Casa De Nylon, A Texas Partnership, Consisting of Abraham Galonsky and Israel Liazka, Adversary No. 96-2053-M in the United States Bankruptcy Court For The Southern District of Texas, McAllen Division.

The bankruptcy court denied relief to Petitioners and held that no automatic stay existed. Petitioners appealed to the district court. After the district court held on March 28, 2001 that the bankruptcy court erred in holding that there was no stay in existence at the time of the foreclosure, the district court remanded the case to the bankruptcy court to ascertain whether the bankruptcy court intended to retroactively annul

the stay. At that time, no motion to annul the stay had ever been filed. Thereafter, Respondents filed a motion to annul the stay on October 15, 2001. The bankruptcy court thereafter granted the Respondents' motion to annul the stay on January 18, 2002, and Petitioners appealed to the district court. The district court affirmed, and Petitioners appealed to the United States Court of Appeals For The Fifth Circuit, which also affirmed.

In their Brief For Appellants to the United States Court of Appeals, Petitioners stated Issue No 2 as follows:

> THE DISTRICT COURT ERRED IN AFFIRMING THE BANKRUPTCY COURT JUDGMENT RETROACTIVELY ANNULLING THE STAY ON JANUARY 18, 2002 BECAUSE THE REQUEST FOR ANNULMENT WAS NOT TIMELY.

Brief For Appellant, p. x; p.1.

REASONS FOR GRANTING WRIT

I. When a bankruptcy case is dismissed on April 24, 1997, which thereby terminates the automatic stay, and no request to retroactively annul the automatic stay is made for more than four years, then an order entered on January 18, 2002 which purports to retroactively annul the automatic stay is untimely, as the automatic stay had expired by operation of law under 11 U.S.C. Section 362(c) when the case was dismissed on April 24, 1997.

Petitioners' position can be stated in essence as follows. The bankruptcy court could not have annulled the automatic stay because the automatic

stay had already expired by operation of law when the case was dismissed more than four years prior to the bankruptcy court's order. The bankruptcy court order of January 18, 2002 purports to retroactively annul the stay in bankruptcy case number 95-24277-M-13. However, bankruptcy case number 95-24277-M-13 was dismissed by the bankruptcy court on or about April 24, 1997.

There is no doubt that under normal circumstances, a bankruptcy court has the authority and jurisdiction to retroactively annul the automatic stay. The automatic stay is different from other matters in a bankruptcy court in that by statute, it has a defined period of life. The automatic stay arises under 11 U.S.C. Section 362 when a bankruptcy petition is filed. 11 U.S.C. § 362(a). Under 11 U.S.C. Section 362(c), the automatic stay expires when (1) the case is closed,

(2) the case is dismissed, (3) or in chapter 7 cases concerning an individual or in cases under chapter 9, 11, 12, or 13, at the time when a discharge is granted or denied. See Interstate Commerce Commission v. Holmes Transportation, Inc., 931 F.2d 984 (1st Cir.1991); In re Bluford, 40 B.R. 640 (Bkrtcy.W.D.Mo.1984); Norton v. Hoxie State Bank, 61 B.R. 258 (D.Kan.1986).

In addition to 11 U.S.C. Section 362(c), the automatic stay may be terminated or annulled under 11 U.S.C. Section 362(d). Termination or annulment of the stay may be for cause, such as lack of adequate protection under 11 U.S.C. § 362(d)(1), when the debtor has no equity in the property and the property is not necessary to an effective reorganization under 11 U.S.C. § 362(d)(2).

In the case at bar, the automatic stay by

statute terminated when the chapter 13 case was dismissed on April 24, 1997. The stay terminated by virtue of 11 U.S.C. § 362(c)(2). At no time prior to dismissal was there a request for retroactive annulment of the stay. Thereafter, there is an attempt by the bankruptcy court to retroactively annul the stay by order of January 18, 2002. By that time, there was nothing left to retroactively annul, as the automatic stay had expired more than four years before on April 24, 1997. The attempt to annul the stay was untimely as it was done more than 4 years after it had expired.

CONCLUSION

For the reasons stated herein, the United States Supreme Court should grant the Petition For Writ of Certiorari and reverse and remand the judgment of the court below.

Respectfully submitted,

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ATTORNEY OF RECORD FOR PETITIONERS RUDY WAUQUIN VELA, RICHARD W. VELA, JALINDA JOYCE BISSETT, REBECCA LEE VELA, AND LISA DEANNA VELA WATSON

NO. _____

UNITED STATES SUPREME COURT
October Term, 2003

IN RE: LISA VELA WATSON,
Debtor.

RUDY WAUQUIN VELA, RICHARD W. VELA, JALINDA JOYCE BISSETT, REBECCA LEE VELA, AND LISA DEANNA VELA WATSON,

Petitioners

V.

JESUS M. CASTELLANO AND CASA DE NYLON, A TEXAS PARTNERSHIP, CONSISTING OF ABRAHAM GALONSKY AND ISRAEL LIAZKA,

Respondents

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

APPENDIX

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

IN RE:	§	CASE NO.
LISA VELA WATSON,	§	95-24277-M-13
DEBTOR	§	CHAPTER 13
	§	
	§	
RAMON WALTER VELA,	§	United States
RUDY WAUQUIN VELA,	§	Bankruptcy Court
RICHARD W. VELA,	§	Southern District
JALINDA JOYCE	§	of Texas
BISSETT, REBECCA LEE	§	ENTERED
VELA AND LISA	§	JAN 18 2002
DEANNA VELA WATSON,	§	Michael N. Milby,
PLAINTIFFS	§	Clerk of Court
	§	
VS.	§	ADVERSARY NO.
	§	96-2053-M
JESUS M. CASTELLANO	§	
AND LA CASA DE	§	
NYLON, A TEXAS	§	
PARTNERSHIP,	§	
CONSISTING OF	§	
ABRAHAM GALONSKY	§	
AND ISRAEL LIAZKA,	§	
DEFENDANTS	§	

ORDER GRANTING MOTION TO ANNUL THE AUTOMATIC STAY

On this day came on for consideration the Motion to Annul Stay filed by Jesus M. Castellano

and La Casa De Nylon ("Movants"). The Court, having heard the arguments of counsel and upon review of the pleadings, briefs, and transcript on file herein, finds that the Motion should be granted.

Judgment was entered in favor of Movants, who were defendants in Adv. No. 96-2053-M, on April 16, 1998. Plaintiffs appealed. The United States District Judge affirmed this Court's judgment on all issues except the Court's conclusion of law that the automatic stay was not in effect. The District Judge's Judgment remanded the case on that issue to allow this Court to consider whether to retroactively annul the stay. Following entry of the District Court's Judgment, Movants filed their Motion to Annul Stay and a hearing was held.

Movants never disputed that they had knowledge of the bankruptcy at the time the foreclosure sale was conducted. Movants have

always alleged, however, that because the property foreclosed upon was held by a spendthrift trust, the automatic stay did not protect it from foreclosure. Movants further alleged that they did not know of any transfer of a portion of the property out of trust to the Debtor, which would move that interest out of the spendthrift exception.

In the Fifth Circuit, "[i]t is well-settled that actions taken in violation of the automatic stay are not void, but merely *voidable*, because the bankruptcy court has the power to annul the automatic stay pursuant to Section 362(d)." *In re Jones*, 63 F.3d 411, 412 (5th Cir. 1995). In determining whether to annul the automatic stay, some courts look at two factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to

the creditor." *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1055 (9th Cir. 1997). Many courts are quick to point out that retroactive relief from the automatic stay should be the rare exception and not the general rule. *In re Soares*, 107 F.3d 969, 977 (1st Cir.1997).

Here, the Court finds that retroactive annulment of the automatic stay is appropriate. At the outset the Court notes that the automatic stay does not protect property held in a spendthrift trust. Even considering the transfer of a small portion of the property to the Debtor and assuming that transfer effectively removed the spendthrift protection, had Movants sought relief from the stay prior to foreclosure, this Court would have granted such relief. The undisputed facts show that there was no equity in the property. Movants were subrogated to the rights of the IRS and the ad

valorem taxing entities. Any transfer of interest from one of the beneficiaries to the Debtor was subject to the federal, state and local tax liens. The debt exceeded $900,000.00 at the time the bankruptcy was filed.

Morever, the Debtor's ability to effectively reorganize is questionable. Debtor originally filed under Chapter 11 on June 5, 1995, the eve of foreclosure. The filing was incomplete and the Debtor did nothing in that case until the United States Trustee moved to convert the case to Chapter 7 on October 17, 1995. Thereafter, the Debtor converted to Chapter 13. The Chapter 13 case was dismissed for failure to make plan payments and necessary amendments to her plan.

Finally, Debtor has had use of the subject property for seven years without paying any property taxes or making any payments on

Movant's note. Debtor received income from the property throughout that time period.

For all the reasons stated above, the stay should be annulled retroactively based on the Debtor's unreasonable and inequitable conduct and to prevent prejudice to the Movants.

It is therefore ORDERED that the Motion to Annul Stay is hereby GRANTED and the automatic stay of 11 U.S.C. §362 is hereby annulled retroactively to the date of foreclosure and the foreclosure is thereby rendered valid.

At Corpus Christi this 17th day of January, 2002.

/s/Richard S. Schmidt
RICHARD S. SCHMIDT
United States Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
FILED
February 23,2004
Charles R. Fulbruge III
Clerk

Summary Calendar
No. 03-40850

IN THE MATTER OF : LISA VELA WATSON,
Debtor

RUDY WAUQUIN VELA; RICHARD W. VELA; JALINDA JOYCE BISSETT; REBECCA LEE VELA; LISA VELA WATSON,

Appellants.

versus

JESUS M. CASTELLANO; LA CASA DE NYLON, A TEXAS PARTNERSHIP CONSISTING OF ABRAHAM GALONSKY AND ISRAEL LIAZKA,

Appellees.

Appeal from the United States District Court for the Southern District of Texas - McAllen Division
Civil Case No. M-02-CV-245

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

The Appellants seek a reversal of the bankruptcy court's decision, affirmed by the district court, that annulled the automatic stay as to a foreclosure of a tiny property interest that had been transferred to Ms. Watson on the eve of foreclosure. Appellants contend that, because the Watson bankruptcy was eventually dismissed, the bankruptcy court lacked jurisdiction to annul the automatic stay retroactively. On the other hand, they want the bankruptcy court to adjudicate their claim for damages occasioned by the alleged violation of the stay.

They cannot have it both ways. If the court had jurisdiction to reopen the case pursuant to 11 U.S.C. § 350 and adjudicate their claim, it also had jurisdiction to annul the stay retroactively, and we find no error in its exercise of discretion in the

annulment decision.

If the court retained jurisdiction by virtue of the ongoing litigation between these parties over these matters for the past seven to eight years, it had jurisdiction to order retroactive annulment.

Finally, because the main bankruptcy case was dismissed for want of prosecution by Ms. Watson, and because the bankruptcy court indicated it would originally have granted relief from the automatic stay for lack of equity in the property, appellants' claim is essentially frivolous: they can state no damages arising from the foreclosure.

The judgment of the district and bankruptcy courts are AFFIRMED.

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

U.S. COURT
OF APPEALS
FILED
MAR 25 2004

CHARLES R.
FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-40850

IN THE MATTER OF:LISA VELA WATSON, Debtor.

RUDY WAUQUIN VELA; RICHARD W. VELA; JALINDA JOYCE BISSETT; REBECCA LEE VELA; LISA VELA WATSON,

Appellants.

versus

JESUS M. CASTELLANO; LA CASA DE NYLON, A TEXAS PARTNERSHIP CONSISTING OF ABRAHAM GALONSKY AND ISRAEL LIAZKA,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States
Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41

FOR STAY OF THE
MANDATE.

REHG-4

(2)

FILED
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No. 04-307

IN THE

Supreme Court of the United States

RUDY WAUQUIN VELA, *et al.*,

Petitioners,

v.

JESUS M. CASTELLANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JESUS M. CASTELLANO AND LA CASA DEL NYLON

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QUESTION PRESENTED

Does a bankruptcy court, after appeal and upon remand from the district court, have jurisdiction to decide whether the automatic stay should be retroactively annulled, as ordered by the district court in its remand order?

INTRODUCTION

The U.S. Court of Appeals for the Fifth Circuit correctly determined that the bankruptcy court, in a bankruptcy case originally filed on June 5, 1995, had jurisdiction to retroactively annul an automatic stay in a case that had been appealed and not decided on appeal until March 28, 2001. This ruling is consistent with the express authority given to bankruptcy courts to reopen cases under 11 U.S.C. § 350(b). This ruling recognized the clear authority of the bankruptcy court to act according to the express order of the district court on remand, namely for the bankruptcy court to decide whether the automatic stay should be retroactively annulled.

STATEMENT OF THE CASE

As recited in the Judgment entered on December 30, 2002, and included in Appendix A hereto, Petitioners were beneficiaries of a testamentary trust created by Raul Vela, their great-uncle, who died in September 1984. The surface right to 2,490 acres of real property was left in trust for the benefit of Petitioners. Rudy Vela was both the trustee and received the mineral rights to the property under the will.

The trust provided for distributions to the beneficiaries at certain ages. The trust further contained a spendthrift provision that prevented any beneficiaries from encumbering, assigning or disposing of their interest in the trust.

The Estate of Raul Vela was unable to pay the federal estate or state and local ad valorem real property taxes. Over the years the amount due the federal government eventually grew to over $800,000, and a federal tax lien was filed against the property. In order to avoid the possibility of foreclosure

by the taxing authorities, Rudy Vela, Trustee, borrowed the $800,000 from Respondents which was secured by a deed of trust on the trust property. The note and deed of trust were executed in January 1993. The loan then became delinquent, and on June 6, 1995, a foreclosure sale of the property was conducted.

This case arose in the context of an adversary proceeding filed by Petitioners challenging the deed of trust securing the indebtedness held by Petitioners. That proceeding also challenged the foreclosure sale on the basis that the automatic stay was violated. On the first appeal, the district court held that the lien was, in all respects, valid. However, the district court held that because the debtor acquired a small fractional interest (an undivided 1/20) that was not part of the spendthrift trust, the stay was violated unless the bankruptcy court, on remand, retroactively annulled the stay.[1]

On pages 12-13 in the Petition for a Writ of Certiorari the statement is made that the case was remanded "to the bankruptcy court to ascertain whether the bankruptcy court intended to retroactively annul the stay." If by this statement Petitioners are attempting to create the impression that the remand order was intended only to determine whether in its original order of April 16, 1998 the bankruptcy court had intended to retroactively lift the stay, the impression is erroneous. The remand order stated that "unless the

1. It is clear that but for this small fractional interest which was contained in a quitclaim deed from her brother, executed just a few days before the note and deed of trust at issue, the Debtor's interest (which was in a spendthrift trust) would not have been part of her bankruptcy estate and there would have been no violation of the automatic stay. *In the Matter of Shearn Moody, Jr., Debtor*, 837 F.2d 719 (5th Cir. 1988); *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983).

Bankruptcy Court retroactively lifts the automatic stay . . . [it] was still in effect at the time of the subject foreclosure." The district court directed the bankruptcy court to determine whether the automatic stay should be retroactively lifted.

REASON FOR DENYING THE PETITION

The decision below is consistent with the statutory framework giving jurisdiction to the bankruptcy courts to reopen cases and does not conflict with any decision of this Court, any Court of Appeals, or any court anywhere. Quite simply, the exercise of jurisdiction by the bankruptcy court to reopen a case and retroactively lift an automatic stay is a matter within the sound discretion of the bankruptcy court, and on the facts of this case that framework of a discretionary standard should not be disturbed.

One only needs to read District Judge Hinojosa's March 28, 2001 Judgment (contained in Appendix B) affirming in part, reversing in part and remanding for further hearings, to resolve the issue of whether the bankruptcy court should have addressed the issue of retroactive annulment of the stay. The bankruptcy court did exactly what it was ordered to do on remand, namely, determine if the automatic stay should be retroactively lifted. Petitioners assert that the bankruptcy court did not have any jurisdiction to address the issue of the automatic stay, even when ordered to do so by the district court on remand, absent a previously filed motion to lift or annul the stay.

Reopening of a closed bankruptcy case is governed by 11 U.S.C. § 350(b), which provides: "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

11 U.S.C. § 350(b). Section 350(b) gives the bankruptcy judge broad discretion to weigh the equitable factors in each case and decide whether to reopen it. *See In re Shondel,* 950 F.2d 1301, 1304 (7th Cir. 1991). A decision by a bankruptcy court to reopen a case under Section 350(b) is reviewed for abuse of discretion. *Donaldson v. Bernstein,* 104 F.3d 547, 551 (3d Cir. 1997).

It cannot be seriously argued that Judge Hinojosa's order of remand was not "other cause" within the meaning of 11 U.S.C.A. § 350(b). Clearly, the bankruptcy court in the instant action had jurisdiction to reopen the case and consider the Motion to Annul Stay. Moreover, since this is exactly what it was ordered to do, it cannot be an abuse of discretion. It is telling that Petitioners do not even mention Section 350(b) in their Petition, let alone address its application.

Petitioners cite three cases, *Interstate Commerce Commission v. Holmes Transportation, Inc.*, 931 F.2d 984 (1st Cir. 1991) *Norton v. Hoxie Bank,* 61 B.R. 258 (D. Kan. 1986); and *In re Bluford,* 40 B.R. 640 (Bkrtcy. W.D. Mo. 1984), none of which address the issue in this case, namely whether the bankruptcy court had jurisdiction to retroactively annul the automatic stay, after a remand order directing it to decide whether it should retroactively lift the automatic stay. None of these three cases are in point on the issue in this case. None of these cases address the situation wherein there was a continuous adversary proceeding that was prosecuted through two rulings in bankruptcy court and two appeals to district court, as is present in the instant case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS MCALLEN DIVISION ENTERED DECEMBER 30, 2002

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CIVIL ACTION NO. M-02-245

IN RE: LISA VELA WATSON,

debtor

RAMON WALTER VELA, WAUQUIN VELA, RICHARD W. VELA, JALINDA JOYCE BISSETT, REBECCA LEE VELA AND LISA DEANNA VELA WATSON,

plaintiffs

VS

JESUS M. CASTELLANO AND LA CASA DEL NYLON, A TEXAS PARTNERSHIP, CONSISTING OF ABRAHAM GALONSKY AND ISRAEL LIAZKA,

defendants.

JUDGMENT

Appellants filed this case as an appeal from a decision of the United States Bankruptcy Court in Adversary No. 95-24277-M-13. The statement of the case and the facts

of the case are evidenced by the record, and both parties filed their briefs herein. This Court, after hearing oral argument and considering the record and the briefs on file, AFFIRMS in all aspects the judgment of the United States Bankruptcy Court for the reasons stated on the record and stated herein.

In their first appeal, the Appellants, including the debtor, Lisa Vela Watson ("Lisa"), argued that the Bankruptcy Court erred in finding that certain property was properly foreclosed upon and in finding that the Appellants owed rents and attorney's fees in connection with the foreclosure. The Appellants were beneficiaries of a testamentary trust created by their great-uncle, Raul Vela, who died in September 1984. The trust consisted of the surface rights to 2,490 acres of real property located in Hidalgo County. The trustee was the Appellants' father and the Settlor's nephew, Rudy Vela, who received the mineral rights to the property under the will.

The trust provided that one-quarter of the property be distributed to each of the three male beneficiaries at age 35, and the remaining one-quarter of the property be distributed in equal parts to the three female beneficiaries as they attained the age of 40. The trust contained a spendthrift provision that prevented the beneficiaries from encumbering, assigning, or disposing of their interest in the trust. On December 2, 1992, Ramon Vela ("Ramon") turned 35. On December 28, 1992, Ramon purported to convey by quitclaim his interest in the trust property to his siblings in exchange for ten dollars.

The Trustee was unable to pay the federal estate taxes or property taxes. The amount of the delinquent taxes eventually grew to more than $800,000. A federal tax lien was filed

agai[illegible]ist the property. To avoid foreclosure by the taxing auth[illegible]orities, the Trustee borrowed the money from the App[illegible]llees to pay the taxes. The note was secured by a deed of tr[illegible]ust on the trust property. Both the note and the deed of trust were executed by the Trustee in January 1993. The loan beca[illegible]me delinquent and on June 6, 1995, the Appellees held a for[illegible]eclosure sale of the property.

[illegible]One day before the foreclosure, Lisa filed a bankruptcy petit[illegible]ion. As part of the Chapter 13 bankruptcy of Lisa, the App[illegible]llants filed an adversary proceeding in the Bankruptcy Cou[illegible]t requesting declaratory judgment that: (1) the part of the p[illegible]roperty conveyed by Ramon to Lisa was protected by the [illegible]utomatic stay provision of the Bankruptcy Code and that [illegible]the foreclosure violated the automatic stay, and (2) beca[illegible]use Ramon reached the age of 35 December 1993, one-[illegible]quarter of the property was no longer in trust in January 1993 [illegible]and could not be encumbered by the Trustee.

[illegible]The Bankruptcy Court disagreed with the Appellants and held [illegible]that the part of the property purportedly conveyed by Ram[illegible]on to Lisa was burdened by a spendthrift provision and [illegible]was therefore not protected by the automatic stay. The Bankruptcy Court also found that the Trustee had auth[illegible]rity to execute the note and deed of trust as to all of the prop[illegible]erty under the "winding up" provision of the Texas Prop[illegible]erty Code. Finally, the Bankruptcy Court found that beca[illegible]se the Appellants did not relinquish possession of the prop[illegible]erty, the Appellants owed the Appellees $102,000 in rents [illegible]and $10,000 in attorney's fees. Appellants appealed.

Appendix A

In the first appeal, the Honorable Richardo H. Hinojosa adopted the finding of facts entered by the Bankruptcy Court. *See* M-98-212. As to the conclusions of law, Judge Hinojosa held that unless the Bankruptcy Court retroactively lifts the automatic stay created when Appellant Lisa Vela Watson filed the Chapter 13 proceeding, the stay was still in effect at the time of the subject foreclosure. *Id.* The case was remanded for further proceedings consistent with this ruling. *Id.*

On remand, the Bankruptcy Court retroactively annulled the automatic stay, found no equity in the property, and found that the ability of the debtor to reorganize was questionable. The court followed *Jones v. Garcia*, where the Fifth Circuit noted that it is "well-settled that 'actions taken in violation of the automatic stay are not void, but rather they are merely *voidable*, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)'[1]" 63 F.3d 411, 413 (5th Cir.1995) (citing, e.g., *Piece v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990)). As noted by the Bankruptcy Court, some courts consider two factors in deciding whether to annul the automatic stay: (1) whether the creditor was aware of the bankruptcy proceeding; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor. *Jones*, 63 F.3d at 412, citing *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1055 (9th Cir. 1997). This Court finds that the Bankruptcy Court did not commit error in retroactively annulling the automatic stay.

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1. "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b).

Appendix A

Appellants also complain of the Bankruptcy Court's findings of facts. Under 11 U.S.C. § 362(g)(1), the Appellees/ Movants have the burden of proof as to Debtor's equity in the property. The debt exceeded $900,000.00 at the time the bankruptcy was filed. Here, the Appellants made a judicial admission in their discovery responses that as of "June 5, 1995, the Fair Market Value of [her] interest, if any, . . . was less than $900,000.00." It is, therefore, undisputed that the Debtor had no equity in the property. In addition, under 11 U.S.C. § 362(g)(2), Appellants have the burden of proving that they have the ability to reorganize. For reasons stated on the record and those contained within the record, the Appellants fail to meet this burden. The Court does not find the Bankruptcy Court's findings of fact to be clearly erroneous.

The decision of the Bankruptcy Court is hereby **AFFIRMED**.

ENTERED this 30th day of December, 2002 at McAllen, Texas.

s/ Randy Crane
HON. RANDY CRANE
UNITED STATES DISTRICT JUDGE

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS MCALLEN DIVISION ENTERED MARCH 28, 2001

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

CIVIL ACTION NUMBER

M-98-212

RAMON WALTER VELA, *et al.*,

Appellants

VS.

JESUS M. CASTELLANO and LA CASA DE NYLON, a Texas Partnership consisting of Abraham Galonsky and Israel Liazka

JUDGMENT

Appellants filed this case as an appeal from a decision of the United States Bankruptcy Court in Adversary No. 96-2053-M. The statement of the case and the facts of the case are evidenced by the record on appeal and both parties filed their briefs herein. The Court, after hearing oral argument and considering the pleadings on file, affirmed in all aspects, save one, the judgment of the United States Bankruptcy Court for the reasons stated on the record.

Appendix B

The Court is of the opinion that the Findings of Fact entered by the Bankruptcy Court in this action on April 16, 1998, should be affirmed in their entirety. As to the Conclusions of Law adopted in the same instrument of April 16, 1998, the Court is of the opinion that unless the Bankruptcy Court retroactively lifts the automatic stay created when Appellant Lisa Vela Watson filed a Chapter 13 proceeding, the stay was still in effect at the time of the subject foreclosure. In all other respects consistent with this ruling, the Court believes the Bankruptcy Court's Conclusions of Law should be affirmed. On the matter of the automatic stay, the Court is of the opinion that the action should be remanded for further proceedings consistent with the Court's ruling. For the reasons stated herein and on the record, it is, therefore,

ORDERED, ADJUDGED and DECREED that the United States Bankruptcy Courts Order is hereby AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

DONE on this 28th day of March, 2001, at McAllen, Texas.

s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE